

# EXHIBIT 13

HLM, Jr.	MGD
DxB	RG
PRK	PN
JMM	BDC
DFS	JA
ELC	KSZ
PxK	ETN
MDA	NWC
DCS	(HYTRIN)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE FOLDING CARTON  
ANTITRUST LITIGATION

Master File No. MDL 250

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

PRETRIAL ORDER NO. 32

MEMORANDUM AND ORDER

This cause is before the court on plaintiffs' motion to modify or vacate the portion of Pretrial Order No. 24 ordering plaintiffs to produce certain financial information sought in defendants' Revised Request No. 16.<sup>1</sup> For the reasons hereinafter stated, the motion is granted.

In Pretrial Order No. 30, we denied plaintiffs' 28 U.S.C. § 1292(b) motion for an order certifying for interlocutory appeal the provision of Pretrial Order No. 24 ordering plaintiffs to produce certain financial information sought in defendants' Revised Request No. 16. In Pretrial

<sup>1</sup>  
Revised Request No. 16 seeks:

A copy of plaintiff's annual reports, balance sheets, profit and loss statements and intra-company annual financial reports or plaintiff's operations utilizing folding cartons.

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Order No. 30, we also deferred ruling on plaintiffs' alternative motion to vacate or modify Pretrial Order No. 24 with respect to Revised Request No. 16. Although we ruled that defendants are not entitled to plaintiffs' financial information to support a pass-on defense, we wanted to give defendants an opportunity to show how the financial information they seek is relevant to the subject matter of this litigation. We stated that, absent such a showing, plaintiffs' motion to vacate or modify would be granted.

Defendants offer three reasons or arguments why the financial data they seek in Revised Request No. 16<sup>2</sup> is relevant to the subject matter of the litigation. Plaintiffs take issue with defendants' arguments. We will consider each of the arguments separately.

<sup>2</sup>  
Before arguing why the documents are relevant to plaintiffs' overcharge claims, defendants enunciate what they consider to be the legal standards applicable to their discovery request. Defendants submit that just because plaintiffs do not intend to use their financial data as evidence does not mean that the data is irrelevant for purposes of discovery. Defendants state that they are not bound by plaintiffs' theory of the case and that they may use their own theories and concepts of proof to support their defense. They assert also that they need not show that the financial data sought is directly admissible into evidence. Defendants point out that discovery is to be considered relevant when there is any possibility that the information sought may be relevant to the subject matter of the litigation.

Defendants further assert that plaintiffs must prove separately three elements — (1) antitrust violation, (2) impact or fact of damage, and (3) amount of damage. Defendants contend that Revised Request No. 16 relates to the issues of impact and

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"Countervailing Power"

Defendants assert that the financial data sought is relevant to determine whether large and prosperous purchasers of folding cartons exercised "countervailing power" to prevent prices of folding cartons from rising to improperly high levels. Plaintiffs concede that some of the purchasers of folding cartons included large and prosperous buyers. They assert, however, that this is completely inconsequential, just as it was in the Electrical Equipment cases, including Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 225 F. Supp. 332 (N.D. Ill. 1963), aff'd, 335 F.2d 203 (7th Cir. 1964).

We do not find defendants' "countervailing power" argument persuasive. The defense that plaintiffs' economic power could have kept the prices of folding cartons down is irrelevant where, as here, the crucial issue is whether there was a conspiracy to fix prices. To suggest that a conspiracy was not as successful as it might have otherwise been because of the plaintiffs' countervailing economic power is absurd. Such an alleged "economic check" is of no consequence in a price fixing case.

In addition, defendants' "countervailing power"

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(2 continued from page 2)

damages. They maintain that plaintiffs may not "avoid the necessity of proving impact or fact of damage by inducing the Court 'to presume' damage from the proof of conspiracy." (Defendants' Brief at 2).

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argument ignores the principle we recognized in Pretrial Order No. 20, In Re Folding Carton Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977), that where a conspiracy to fix prices is established, all members of the class are presumed to have been injured in fact. That is, assuming that it is demonstrated that the prices of folding cartons were fixed, all buyers thereof will be presumed to have paid higher prices for those cartons by reason of the price-fixing conspiracy. Whether certain buyers made profits is irrelevant to the question whether those buyers actually paid higher prices as a result of the alleged conspiracy to fix prices. Moreover, buyers' leverage is not determined by profits, but by volume of purchases. Plaintiffs state that they have already made available to defendants information regarding the quantity of their folding carton purchases.

"Backward Integration"

Defendants argue that the financial data sought could be used to assess the size and prosperity of buyers to measure the feasibility of "backward integration" by which purchasers of folding cartons would develop their own folding carton manufacturing facilities. Defendants contend that evidence that "backward integration" is relatively easy and inexpensive, coupled with evidence of prosperous buyers able to make the necessary capital investment, would tend to demonstrate the lack of impact of any price-fixing conspiracy.

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Defendants submit that if "price-fixers" caused folding carton prices to become excessive, buyers would make their own cartons.

Plaintiffs contend that the feasibility of "backward integration" is equally immaterial in a case such as this where overcharge is the sole basis for damage. They concede that some purchasers of cartons use relatively large numbers of cartons, and state that they have provided discovery, without objection, as to purchases they made. Nevertheless, plaintiffs submit that their profits or losses in other aspects of their business would not be pertinent and would involve the very inquiries prohibited by Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977).

We find defendants' relevance arguments with respect to "backward integration" without merit. The feasibility of "backward integration" is immaterial where, as here, the sole basis for damages is overcharge. Even assuming that some of the plaintiffs had the power to enter the folding carton manufacturing business and manufacture their own folding cartons, this would not make the details of their financial situations relevant to an overcharge case in which they were suing as purchasers. A fortiori, such financial information is irrelevant where it is unknown whether "backward integration" is feasible. Moreover, while

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evidence regarding the feasibility of "backward integration" might well be relevant in a monopoly case, it is irrelevant to the alleged price-fixing conspiracy before us.

#### Profitability and Damage Evidence

Defendants state that the financial data sought could help them to rebut plaintiffs' damage evidence. Defendants contend that "if the profitability of the buyers' operations using folding cartons increased by more than the standard price indices during the precise time at which the plaintiffs claim the conspiracy became effective," (Defendants' Brief at 6) it would detract from the weight of plaintiffs' damage evidence. Defendants further state that because plaintiffs traditionally use defendants' profit data to prove overcharges and damages, defendants should be entitled to discover plaintiffs' profitability in order to attempt to develop evidence of lack of impact and damages.

Plaintiffs contend that "[w]hether 'the profitability of the buyers' operations using folding cartons increased by more than the standard price indices' is not only irrelevant, but clearly illustrates the vice of defendants' entire position on Request No. 16." (Plaintiffs' Brief at 4). Plaintiffs submit that "the Court would be obliged to inquire into the economics and finances of practically every major industry using cartons, to ascertain whether each purchaser absorbed, passed-on or made a profit on the overcharges, in comparison with industry generally, and the amounts thereof."



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Id. Plaintiffs assert that the magnitude and complexity of such investigations would dwarf the genuine issues of conspiracy and overcharge. Finally, plaintiffs state that such investigations are clearly proscribed by the Supreme Court's decision in Illinois Brick.

As we have stated previously, the mere fact that plaintiffs are entitled to financial data about defendants does not mean that defendants are necessarily entitled to plaintiffs' financial data. See Pretrial Order No. 24, In Re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D. Ill. 1977). Whether plaintiffs should be required to produce financial information is a separate question. Id.

We agree with plaintiffs that whether the profitability of purchasers' operations using folding cartons increased by more than the standard price indices is irrelevant to the subject matter of this litigation. If there was an overcharge, its amount can be determined by looking at the price movement of folding cartons and not the profit pictures of various folding carton purchasers. If plaintiffs are entitled to recover for an overcharge, they will do so regardless of whether their profits decreased or increased during the period of the conspiracy. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). Whether purchasers absorbed, passed-on, or made a



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profit on the overcharges in comparison with the industry generally is irrelevant, and investigations into such matters are proscribed by Illinois Brick.

Other Matters

Defendants question our reliance on plaintiffs' statement that they seek to recover only overcharges and not lost profits or injury to business. When we issued Pretrial Order No. 30, we thought plaintiffs' position was clear. Whatever uncertainty defendants may have thought previously existed in the record has been formally clarified by plaintiffs. They have stated categorically that "[p]laintiffs do not and will not seek to recover lost profits." (Plaintiffs' Reply Brief at 1).

Defendants nevertheless assert that none of the statements concerning the intentions of the named plaintiffs indicate any commitment concerning potential claims for consequential damages by opt out plaintiffs or by class members. They submit that "[s]ince it is doubtful that the named plaintiffs as class representatives have authority to waive consequential damage claims of class members, a court order barring such claims (perhaps after notice to the class) would be necessary before defendants could be confident that these claims had been eliminated from this litigation." (Defendants' Brief at 8). Consequently, defendants suggest that if we conclude that the claims for consequential damages have been eliminated from this litigation, an order should

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be entered barring any named plaintiffs, class members, or opt outs who have filed suits which are before us from asserting any claims for damages other than alleged overcharges. Absent such an order barring plaintiffs, defendants assert that it is undisputed that Revised Request No. 16 is relevant to the damage claims.

Finally, defendants submit that, if any claimants intend to assert consequential damage claims, then defendants are entitled to the requested financial data from all plaintiffs; not just from those members who may ultimately seek consequential damages. Defendants reason that proof of causation between a claimed overcharge by defendants and a "turndown" in the profits of a class member claiming consequential damages is inherently conjectural. Therefore, they argue that they are entitled to discovery in an effort to rebut the claimed impact by using as a comparison profitability figures relating to the named plaintiffs who were not claiming consequential damages.

We must first note that the motion before us was filed by counsel representing the class. Plaintiffs who have opted out of the class and filed individual actions did not join in the motion. We do not know upon what damage theory these nonclass plaintiffs are proceeding. If they seek to recover lost profits or for injury to business, defendants would be entitled to discover their financial data. We do not agree with defendants that we should enter an order

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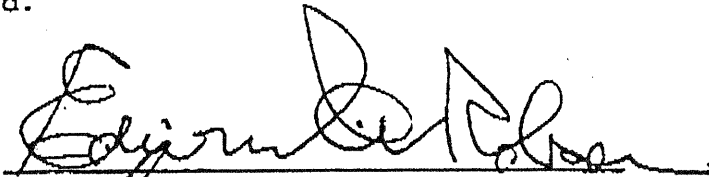
barring nonclass plaintiffs from asserting any claims for damages other than for alleged overcharges especially where, as here, we do not know upon what damage theory they are proceeding.

Defendants' suggestion that the named plaintiffs, as class representatives, are waiving consequential damages of class members and that the representatives lack authority to do so misses the mark. At this time, we have simply received a representation from counsel for the class representatives that no class plaintiff seeks or will seek to recover for lost profits. At this time, we see no reason why we cannot rely upon this clear, unequivocal statement. We assume that the attorneys for the class representatives are fulfilling their obligations to the class members and that these attorneys would be aware of, and advise us of, any class member seeking to recover lost profits.

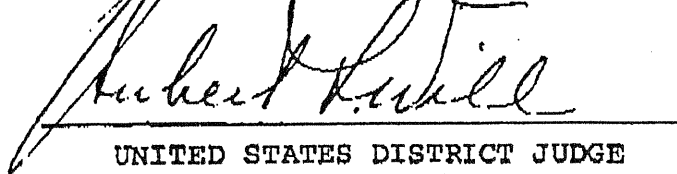
We do not believe that it is necessary to enter an order barring any named plaintiff or class members from asserting any claims for damages other than for alleged overcharges. As for defendants' argument that, if claimants intend to assert consequential damage claims, then defendants are entitled to the requested financial data from all plaintiffs, we need not reach it until such time as we are advised that any plaintiff seeks consequential damages.

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For the reasons stated, it is therefore ordered that plaintiffs' motion to modify or vacate the portion of Pretrial Order No. 24 ordering plaintiffs to produce certain financial information sought in Revised Request No. 16 is hereby granted.



UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT JUDGE

May 5, 1978.